FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-208

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

JEAN-MARIE MAUCLET,

Appellee.

EWALD B. NYQUIST, Commissioner of Education of the State of New York, THE UNIVERSITY OF THE STATE OF NEW YORK, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THE NEW YORK HIGHER EDUCATION ASSISTANCE CORPORATION, WILLARD C. ALLIS, DR. ERNEST BOYER, DR. JUDAH CAHN, WILMOT R. CRAIG, THOMAS P. DENN, WALTER A. KASSENBROCK, NORMA KERSHAW, REV. LAURENCE J. McGINLEY, S. J., WILLIAM G. MORTON and RUSSEL N. SERVICE, being the members of the board of directors of said corporation, and THE NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION,

Appellants,

against

ALAN RABINOVITCH,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE WESTERN AND EASTERN DISTRICTS OF NEW YORK

REPLY BRIEF

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REPLY BRIEF

A.

New York Education Law §661(3) is excepted from strict scrutiny.

Education Law § 661(3) does not distinguish between individuals on the basis of alienage or the "negative lack of American citizenship." Rabinovitch brief, p. 13. The

only distinctions drawn by the statute are "*within* the class of aliens." *Mathews* v. *Diaz,* 426 U.S. 67, 80 (1976) (Emphasis original). See Appellants' main brief, pp. 18-20.*

Appellees distinguish the classification reviewed in *Diaz, supra,* from § 661(3) on the ground that the former involved federal regulation of immigration and naturalization. Rabinovitch brief, pp. 12-13; Mauclet brief, pp. 14-15. Appellants do not question the power of federal government to pre-empt state legislation affecting aliens in appropriate circumstances. *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 100-101 (1976); *Mathews* v. *Diaz, supra* at 84-87. See discussion pp. 12-14 *post.* However, neither the existence nor the exercise of federal power over aliens determines whether a given classification is "based on alienage." *Graham* v. *Richardson,* 403 U.S. 365, 372 (1971). That conclusion can only be drawn from the inclusionary and/or exclusionary characteristics of the classification itself, matters irrelevant to the source of the legislative power. The classification in *Diaz* allowed Medicare benefits for citizens and aliens with permanent residence of at least five years, excluding all other aliens. 426 U.S. at 69-70. This Court concluded that the "real question" presented by the classification was "not whether discrimination between citizens and aliens is permissible," but whether the "dis-

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* The student aid programs at issue herein provide benefits for more aliens than the Medicare program considered in *Mathews* v. *Diaz, supra* at 69-70, i.e. student aid is available to certain permanent residents and to non-immigrant paroled refugees under § 661 (3) whereas Medicare benefits are limited to aliens with at least five years permanent residence. Appellants' main brief, p. 20. Appellee Mauclet disputes this point, stating that the residence requirement in Education Law § 661(5)(a), (b), bars non-immigrants from student aid. Mauclet brief, pp. 2-3. He cites a 1974-75 Student Payment Application (Pl. Ex. "A," A. 94). *Ibid.* Appellee fails to take note of the 1975 amendment to § 661(3) which added non-immigrant paroled refugees [8 U.S.C. § 1182(d)] to the aided class. L. 1975 c. 663, effective July 1, 1975. The application form cited predates this amendment. Moreover, appellee offers no basis for reading Education Law § 661(5)(a), (b) as denying non-immigrant refugees the benefits conferred upon them under § 661(3)(d) by the Legislature in its 1975 session.

crimination *within* the class of aliens—allowing benefits to some aliens but not to others—is permissible." 426 U.S. at 80. Emphasis original. Education Law § 661(3) allows student aid for citizens, aliens willing to become citizens, either presently or when relieved of a disability, and paroled refugees. Like the Medicare statute considered in *Diaz,* § 661(3) simply allows "benefits to some aliens but not to others." *Ibid.* In face of *Diaz,* it cannot be viewed as creating a classification "based on alienage." *Graham* v. *Richardson, supra.*

Even when alienage is used as a classifying criterion, it is not invested with, or divested of, a suspect quality for equal protection purposes depending upon whether it is used in a state or federal statute. Compare Rabinovitch brief, pp. 13-14; Mauclet brief, pp. 14-16. The latitude this Court has afforded federal statutes is based on the acknowledged difference in the scope of federal and state power over aliens, not upon an equal protection theory which would find alienage not suspect in all federal laws but suspect in all state laws. *Weinberger* v. *Wisenfeld,* 420 U.S. 636, 638 n. 2 (1975), stating that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." See *Mathews* v. *Diaz, supra,* at 80, 81-82, 84; *Hampton* v. *Mow Sun Wong, supra,* at 100-101. To the extent that it is drawn in question in these actions, Education Law § 661(3) provides gifts of state funds to students pursuing higher education who are citizens of the state and to aliens who are identified with the state interests involved in the program. The statute operates in an area which is free of federal concern and does not discriminate against anyone. See discussion pp. 8-9, *post.* Accordingly, there is no basis for more stringent review of § 661(3) under the Equal Protection Clause than was afforded the limitations on alien eligibility for Medicare in *Mathews* v. *Diaz, supra* at 77-80, 82-84.

Graham v. *Richardson, supra,* is not opposed. Therein Arizona's fifteen year alien residence for eligibility for

welfare was correctly identified with Pennsylvania's express citizenship requirement. The extraordinary durational extent of the Arizona requirement was tantamount to a denial of benefits, and therefore both the Arizona and Pennsylvania statutes were classifications "based on average". 403 U.S. at 372, 379-80. Additionally, the distinction drawn between federal and state regulation of welfare in *Mathews* v. *Diaz, supra* at 85, has no application. There may be "no apparent justification" for state welfare classifications that allocate "persons who are not citizens of the state into subcategories of United States citizens and aliens" since "there is little, if any, basis for treating persons who are citizens of another state differently from persons who are citizens of another country." *Ibid.* Under § 661(3), the American citizen who resides in another state and the alien who refuses to become a citizen of New York State are treated identically because no individual in either of the excluded classes advances New York's interests in the program. The excluded citizen participates in and has access to the political community of the state of his residence and is otherwise identified with that state. The excluded alien has refused full participation in the New York community, preferring to continue his identification with the country of his nationality. Compare Rabinovitch brief, p. 27.

Examining Board v. *de Otero,* 426 U.S. 572 (1976), *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), and *In re Griffiths,* 413 U.S. 717 (1973), are consistent with appellants' position. Compare Mauclet brief, pp. 15-16. The classifications in the cited cases were in fact based on alienage and denied access to the means of earning a livelihood in substantial segments of the economy. The classifications in *Takahashi* v. *Fish Game Commission,* 334 U.S. 410 (1948), and *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886), referred to particular alien nationalities that were permanently excluded from citizenship. Education Law § 661(3) is not selective as to nationality and does not place any

obligation upon an alien which is beyond his capacity to meet. Compare Rabinovitch brief, p. 13.

Appellee Rabinovitch opposes the exception of § 661(3) from strict scrutiny on the additional ground that the statute does not benefit from the political community doctrine described in *Sugarman* v. *Dougall, supra* at 646-49. Rabinovitch brief, pp. 14-15. See Appellants' main brief, pp. 20-21. Appellee contends that § 661(3) does not aid in the definition and presentation of New York's political community because "it does not speak directly to a person's 'participation in [the state's] democratic political institutions.'" Rabinovitch brief, p. 15 quoting *Sugarman* v. *Dougall, supra* at 648. As the review of the prior decisions of this Court in *Dougall* makes clear, states retain the power and responsibility of qualifying their own officeholders and voters. 413 U.S. at 647-48. The student aid provided under Education Law § 661(3) is intended to enhance the educational opportunities of just those individuals and to increase their number as well as assisting the adjustment of refugees. See Appellants main brief, pp. 22-24. The statute is therefore tied directly to New York's democratic institutions.

B.

New York's interest in enhancing the educational level of its electorate and inducing membership are legitimate state goals. In providing gifts of state funds, New York may also select individuals who are willing to accept a complete identification with the state as distinguished from individuals who prefer another state or nation.

States have a recognized interest in the qualifications, educational level and numerical strength of their electorates which is separate and distinct from any national interest. *Sugarman* v. *Dougall, supra* at 647-48. See *Oregon* v. *Mitchell,* 400 U.S. 112, 124-31 (1970) (provision of Voting Rights Act of 1970 lowering voting age to 18 in state elections invalidated) (opinion of Black, J.); *id.*

at 201-203, 207-209 (Opinion of HARLAN, J.); *Pope* v. *Williams,* 193 U.S. 621, 632-34 (1904); *Luther* v. *Borden,* 7 How. 1, 40-41 (1849). See also *Rosario* v. *Rockefeller,* 410 U.S. 752, 761 (1973). The state's interest in this regard includes the qualification of its own officeholders. *Perkins* v. *Smith,* 370 F Supp. 134 (D. Md. 1974), aff'd —— U.S. ——, 96 S.Ct. 2616 (1976) (jurors); *Boyd* v. *Thayer,* 143 U.S. 135, 161 (1892) (Governor); *Foley* v. *Connelie,* 419 F. Supp. 889 (S.D.N.Y.), appeal docketed —— U.S. ——, 45 U.S.L.W. 3449 (Jan. 4, 1977) (police). Compare Rabinovitch brief, pp. 24-25; Mauclet brief, pp. 24-26.

In enchancing the educational opportunities of the potential voter, officeholder and "citizen" leader, L. 1961, c. 389, § 1(a), New York looks to the quality of its own political processes and its competitive position with other states, not merely to generalized benefits the nation as a whole may derive from a more highly educated populace. Since citizenship is a threshold requirement for participation in both state and national political communities, appellees' contention that Education Law § 661(3) reflects, or can only reflect, national concerns must be rejected.* Rabinovitch brief, pp. 24-25; Mauclet brief, pp. 24-26. New York advances its own interests in the manner just described under the statute. Moreover, the state is not required to exclude consideration of an individual's willingness to become a citizen in designating recipients of gifts of state funds. See *Mathews* v. *Diaz, supra* at 78-79, enumerating federal constitutional and statutory distinctions between citizens and aliens and statutory distinctions among aliens. It is surely not required to confine its

* New York requires citizenship of the Governor and Lieutenant Governor (N.Y. Const. Art 4, § 2), members of the legislature (N.Y. Const. Art 3, § 7), public officers (Public Officers Law § 3), voters (N.Y. Const. Art. 2, § 1), police [Executive Law § 215 (3)] and trial and grand jurors [Judiciary Law §§ 504(1), 531(3), 596(1), 609(1), 662(1), 684(1)].

interests to expanding its population and obtaining increased fedral grants-in-aid. Mauclet brief, *ibid.* As Congress and the President may establish qualification requirements for the federal career service and use those requirements to induce participation in the national political community, *Hampton* v. *Mow Sun Wong, supra* (at 104, 105), so the state legislature and the Governor may provide enhanced educational opportunities for present and future state citizens and induce membership in the state's political community. Rabinovitch brief, *Ibid.;* Mauclet brief, pp. 25-26. The contention that New York's pursuit of these goals falls outside the political community doctrine described in *Sugarman* v. *Dougall, supra,* is irrelevant. Rabinovitch brief, pp. 22-24. Although appellants believe that the interests reflected by the student aid programs are so related and thus provide one basis for excepting § 661(3) from strict scrutiny, Appellants' main brief, pp. 18-22 and discussion, p. 5 *ante,* the use of the term "political community" does not of itself enhance or diminish the legitimacy and substantiality of any state interest. It merely provides a convenient designation for a group of interests which may be examined free from any alleged doctrinal connection.

Appellee Rabinovitch misapprehends the state's concern about an alien's willingness to become a citizen and the difficulties he faces as a paroled refugee, identifying these characteristics with the "special public interest" doctrine formerly invoked to justify excluding aliens from public resources on the ground that access to such resources was a privilege, not a right. Rabinovitch brief, p. 17. As this Court made plain in *Diaz,* the selection of certain aliens for benefits on the basis of their ties to the United States is an appropriate exercise of governmental power. 426 U.S. at 80, 83. The "principled reasoning," *Diaz, supra* at 82, offered by appellants in support of Education Law § 661(3) shows that the criteria adopted by the statute reflect specific ties to the state that advance its

interests in the student aid program. Appellants' main brief, pp. 19-20, 22-23, 24-25. Appellants do not contend that access to the student aid program is a privilege to be granted or denied in the state's absolute discretion, and no aspect of the "special public interest" doctrine is involved.

That Education Law § 661(3) designates certain alien students as the beneficiaries of gifts of state funds, necessarily excluding others, does not foreclose the excluded aliens from access to higher education and does not discriminate against them. Appellants' main brief, p. 21. Compare Rabinovitch brief, pp. 15-16, 30-32; Mauclet brief, pp. 28-29, 36. The student aid programs regulated by § 661(3) enhance an individual's opportunity for higher education. They do not create or deny such opportunity.

TAP awards are intended to make "some [financial] provision" for students who seek higher education and "the amount of money available for each student is not great measured by the present cost of college education." Memorandum of the State Education Department in support of L. 1961, c. 389, McKinney's Laws of 1961, pp. 1963-64. See discussion Appellants' main brief, pp. 14-15. Regents scholarships are currently limited to $250 annually. Education Law § 670(b). The state budget for direct student aid for fiscal 1976-77 is $216.3 million.* In contrast, the direct aid budget for institutions offering higher education is $1 billion 274 million for fiscal 1976-77.** This

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* The direct student aid categories are as follows: TAP ($184.2 million); Regents scholarships and fellowships ($23.8 million); State University Awards ($1.9 million); and interest and defaults on student loans ($6.4 million). Reference to State University Awards was inadvertently omitted from the 1975-76 figures previously provided. The amount is included in the interest and default category. Appellants' main brief, p. 8, first footnote.

** The direct institutional aid categories are as follows: SUNY operations ($636.7 million); state aid to CUNY and affiliated com-

(footnote continued on following page)

aid subsidizes the tuition cost of citizens and aliens [except aliens on student visas, 8 U.S.C. § 1101(a)(15)(F) and foreign diplomats, embassy personnel and their families, 8 U.S.C. § 1101(a)(15)(A),(G)] on like terms.*

As the above comparisons demonstrate, the beneficiary of student aid receives a limited financial "bonus" by operation of § 661(3). In receiving that bonus he does not burden the non-recipient's access to higher education. A candidate's merit is examined in the same manner regardless of whether he is a recipient or non-recipient, and the cost of tuition is same. If a non-recipient is truly needy, he may obtain assistance from other public programs, see e.g. Mauclet brief, pp. 25-26 n. 46 listing some federal programs, from the private sector in the form of loans or independent scholarship funds, or he may work. See *August* v. *Bronstein*, 369 F. Supp. (S.D.N.Y.) (three-judge court), *aff'd* 417 U.S. 901 (1974), sustaining civil service preference credits for state veterans even though use of such credits can delay or foreclose the appointment of equally qualified, non-preferred candidates; *Spatt* v. *New York*, 361 F. Supp. 1048, 1053 (three-judge court), aff'd 414 U.S. 1058 (1973), in-state limitation on use of Regents scholarships not a penalty upon otherwise qualified eligibles who wish to attend college out-of-state; *C.D.R. Enterprises* v. *Board of Education*, 412 F. Supp. 1164, 1176 (E.D.N.Y. 1976) (three-judge court, *Platt*, D.J., dissenting), aff'd —— U.S. ——, 45 U.S.L.W. 3455 (Jan. 11, 1977), stating, *inter alia*, that "[f]ailure to grant a benefit [herein, a gift] is not identical . . . with imposing a burden."

(footnote continued from preceding page)

munity colleges ($192.9 million); aid to community colleges sponsored by local jurisdictions ($93.9 million); aid to non-sectarian, independent schools ($62.7 million); and capitation awards to medical and dental schools ($16.1 million). Amounts for debt service and capital construction are omitted.

* New York residence is required for reduced tuition at public colleges and universities. There is no durational residence requirement.

Appellees put aside the distinctions between alien recipients of student aid under § 661(3) and alien non-recipients, Appellants' main brief, pp. 19, 22-25, noting that non-recipients may live in New York as long, or longer, than recipients and that both groups pay federal and state taxes. Rabinovitch brief, pp. 17, 26; Mauclet brief, pp. 28-29. Neither circumstance affects the validity of § 661(3). The permanent resident alien who refuses naturalization cannot become a full participant in community life no matter how long he resides in New York.* The paroled refugee receives aid to ease his resettlement in New York, a circumstance not shared by the long-term alien resident.

The fact that alien non-recipients pay taxes does not afford them a right to participate in the student aid program or identify them with recipients in any relevant way.** The taxpayer is not entitled to a direct or proportionate benefit for his payment, *Kelly* v. *Pittsburgh*, 104 U.S. 78 (1881); *American Commuters Association, Inc.* v. *Levitt*, 279 F. Supp. 40 (S.D.N.Y. 1967), *aff'd*, 405 F.2d 1148, 1152-53 (2nd Cir. 1969), sustaining exclusion of taxpaying commuters from New York Regents scholarships and reduced and free tuition at state and city schools among other programs; *Morton Salt Co.* v. *City of South Hutchison*, 159 F.2d 897, 900-901 (10th Cir. 1947). To the extent that the tax payer is entitled to any return for his payment, he receives it in the form of protective services, e.g. military, police, fire. *American Commuters Association, Inc.*, v. *Levitt, supra.**

* Appellee Rabinovitch has been in New York 13 years (A.68), appellee Mauclet, 8 years (A. 49).

** Aliens who are not diplomats pay excise and property taxes. They are also obligated to pay federal and state income taxes assuming appropriate income levels. It is apparent that appellees Rabinovitch and Mauclet have paid excise taxes, see e.g. *Sugarman* v. *Dougall, supra* at 658-59 (*Rehnquist*, J. dissenting), as have aliens here on student visas whom appellees believe can be properly excluded from student aid. Mauclet brief, pp. 2, 32. There is no allegation that either appellee ever paid any other tax. Indeed, appellee Mauclet's claim that he should receive the maximum $600 TAP award (A.50, Mauclet brief, p. 2) means that his net income plus certain exempt income [Education Law § 663(1)] does not exceed $2,000 annually. Education Law § 667(3)(b).

Education Law § 661(3) is not imprecise because it fails to guarantee that the aided individual will accept the responsibilities of citizenship or even that they will remain in New York. Compare, Rabinovitch brief, pp. 25, 28; Mauclet, pp. 27-28. It is not imprecise because it does not guarantee that the paroled refuge will not be confronted by other problems which will make his resettlement in New York difficult. Compare Rabinovitch brief, p. 27. Strict scrutiny does not require a guarantee of the achievement of any state interest. A classification need only be "necessary" to, i.e. have an established nexus with, the accomplishment of a substantial state interest. *In re Griffiths*, 413 U.S. 717, 722 (1973). No demonstration that the classification has, or will, succeed in obtaining the desired result is required. Indeed, no federal or state program could withstand such scrutiny. Moreover, as appellee Mauclet concedes (brief, p. 28), the application of such a test to § 661(3) "would raise serious constitutional questions" under the First and Fourteenth Amendments. As this Court has observed, strict scrutiny does not "secretly require the impossible." *Dunn* v. *Blumstein*, 405 U.S. 330, 360 (1972).

* Permanent resident aliens are eligible for the draft when the relevant statutes are in force, 50 App. §§ 453, 456(a)(1), but may obtain exemptions pursuant to treaty or by changing their status to non-immigrant. 8 U.S.C. § 1257(a).

C.

Education Law § 661(3) does not conflict with any paramount federal policy regarding aliens or with any federal statute.*

State laws which affect aliens are not *per se* pre-empted by the federal constitutional power over immigration and naturalization, whether latent or exercised. U.S. Const., Art. 1, § 8, cl. 4. *De Canas* v. *Bica*, 424 U.S. 351, 355 (1976).** Nor does the enactment of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, provides a basis for finding that states are precluded from enacting laws in aid of higher education which may have a limited effect on some aliens. *Id.* at 356-63. The comprehensiveness of the Immigration and Nationality Act with respect to the regulation of immigration and naturalization does not draw in gifts in aid of higher education as "'plainly

* The district court did not decide this issue (A. 96-102), and it should not be considered by this Court. The issue is properly directed to a single district judge with an appeal as of right to a Court of Appeals. *Hagans* v. *Lavine*, 415 U.S. 528, 543-47 (1974); *Rosado* v. *Wyman*, 397 U.S. 397, 403 (1970). It could then come before this Court only on petition for a writ of certiorari. 8 U.S.C. § 1254. In addition, decisions below would illuminate a point raised by appellee Rabinovitch that § 661(3) conflicts with federal regulations governing the Guaranteed Student Loan Program which provides partial reimbursement for the state program. Rabinovitch brief, p. 35; Appellants' main brief, pp. 16-17. Appellee contended below that the use of the term persons in the United States "for other than a temporary purpose . . . [who] inten[d] to become permanent resident[s] thereof" in 45 C.F.R. § 177.2(a) (1976) required his inclusion in the state loan program to the extent that it was federally subsidized. Appellants have never included permanent residents who have refused to declare their intention to become citizens, viewing the eligibility requirements in the federal regulations as alternatives that may be combined or not as the state chose. Their view has never been opposed by the federal Office of Education (A. 82).

** There is also no *per se* pre-emption under the federal foreign relations power. U.S. Const. Art. 1, § 8, cl. 3, Art. 2, § 2, ch. 2. *Zschernig* v. *Miller*, 389 U.S. 429 (1968); *Clark* v. *Allen*, 331 U.S. 503 (1947).

within . . . [that] central aim of federal regulation' " any more than it draws in California's limitation on the employment of illegal aliens. *Id.* at 359 quoting *San Diego Unions* v. *Garmon*, 359 U.S. 236, 244 (1959). The several provisions of the Act cited by appellees show that this is in fact the case. Education Law § 661(3) is not directed to filtering out subversive aliens, examining their loyalties or to limiting their right to reside permanently in the United States and in New York. Compare Rabinovitch brief, pp. 32-33. Nor does it consider or affect immigration preferences which favor reuniting families or skilled workers. Compare Mauclet brief, pp. 31-32. Although federal law requires that most aliens wait five years until they can become naturalized and places no outer limit on a petition for naturalization, it also allows a resident alien to declare his intent to become a citizen whenever he chooses to do so. 8 U.S.C. § 1445(f). Accordingly, the fact that an alien may choose to declare his intent early in order to come within § 661(3) or for any other reason does not oppose federal law.

In light of these considerations, appellees' pre-emption argument can only be sustained if § 661(3) " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " in enacting the Immigration and Nationality Act. *DeCanas* v. *Bica, supra* at 363 quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) and *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 141 (1963). In this context, the Court must determine whether the state legislation under review discriminates against lawfully admitted aliens by imposing "additional burdens not contemplated by Congress." *DeCanas* v. *Bica, supra* at 358 n. 6. *Takahashi* v. *Fish & Game Commission, supra* at 419. No such "additional burdens" are imposed by § 661(3). To the contrary, the distinctions drawn by § 661 (3) do not burden alien status as such and have in fact been

contemplated by Congress. Although no longer part of the naturalization process, Congress has carried forward the declarant provision of the Immigration and Nationality Act. 8 U.S.C. § 1445(f). It has so acted with evident awareness of the numerous federal and state programs which utilize declarant status in determining eligibility and with at least tacit approval of the use of that criterion. See *Mathews* v. *Diaz, supra* at 78 n. 12. Moreover, § 661(3) simply withholds a gift, or limited financial incentive, from some aliens. The excluded alien is no more burdened as a result than the examination candidate who cannot obtain veteran's preference credits or the taxpayer who cannot gain access to the programs his taxes support. See discussion pp. 8-9 *ante* and cases cited. His circumstance is not comparable to the alien who cannot obtain the necessities of life if he becomes indigent, *Graham* v. *Richardson, supra,* or who is barred from "the entire field of industry with the exception of enterprises that are relatively very small." *Truax* v. *Raich,* 239 U.S. 33, 40 (1915).

Reliance on 42 U.S.C. § 1981 is inappropriate. Compare Rabinovitch brief, p. 29. Access to state grants is not a matter of "security of persons and property" within the meaning of the statute. *Heim* v. *McCall,* 239 U.S. 175, 193-94 (1915), construing identical language in a treaty with Italy and sustaining exclusion of aliens from public works; *Patsone* v. *Pennsylvania,* 232 U.S. 138, 145 (1914), construing same language and sustaining prohibition on aliens hunting wild game.

CONCLUSION

For the foregoing reasons and those set forth in Appellants' main brief, the judgment of the District Court should be reversed and Education Law § 661 (3)(a), (b) and (c) declared valid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Dated: New York, New York
March 18, 1977

Respectfully submitted,

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